

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS



Statement for the Record of Karen Harned

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Before the

United States Senate Committee on Banking, Housing, and Urban Affairs

**Hearing on: "Outside Perspectives on the Collection of
Beneficial Ownership Information."**

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Chairman Crapo, Ranking Member Brown, and members of the committee,

On behalf of NFIB, I appreciate the opportunity to submit for the record this testimony for the Senate Banking, Housing, and Urban Affairs Committee hearing entitled, "Outside Perspectives on the Collection of Beneficial Ownership Information."

My name is Karen Harned, and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB proudly represents approximately 300,000 members nationwide from every industry and sector.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

The Financial Crimes Enforcement Network's (FinCEN) Customer Due Diligence Rule (CDD) took effect in May of 2018. Although this regulation has only been federal law for just over a year, Congress is considering replacing the rule with significant statutory expansions. Congress does not have any data on the effectiveness of the CDD Rule in combatting money laundering. Yet last week the House Financial Services Committee favorably reported H.R. 2513, the *Corporate Transparency Act of 2019*. Disappointingly, that committee did not invite testimony from any organizations representing small businesses – the only stakeholders that would be negatively impacted by the legislation.

NFIB appreciates the opportunity to speak for the millions of small business owners who would be negatively impacted by a new small business beneficial ownership reporting requirement and registry. My testimony today will focus on the small business concerns with the *Corporate Transparency Act of 2019*, and the draft *ILLICIT CASH Act* – two significant beneficial ownership bills under discussion in the 116th Congress. NFIB opposes legislative proposals such as the *Corporate Transparency Act of 2019* and the *ILLICIT CASH Act* because they impose burdensome, costly, and intrusive requirements to file yet more reports with the government and threaten the constitutionally protected privacy rights of law-abiding small business owners.

A Significant New Regulatory Burden for Small Business

According to the 2016 NFIB Small Business Problems and Priorities report, “unreasonable government regulations” ranks second – only behind taxes – as the most important problem small business owners face.¹

In a *Small Business Poll* on regulations, NFIB found that almost half of small businesses surveyed viewed regulation as a “very serious” (25 percent) or “somewhat serious” (24 percent) problem.² NFIB’s survey was taken at the end of 2016, and, at that time, 51 percent of small business owners reported an increase in the number of regulations impacting their business over the last three years.³

Compliance costs, difficulty understanding regulatory requirements, and extra paperwork are the key drivers of the regulatory burdens on small business.⁴ Understanding how to comply with regulations is a bigger problem for those firms with one to nine employees, since 72 percent of small business owners in that cohort try to figure out how to comply themselves, as opposed to assigning that responsibility to someone else.⁵

NFIB’s research shows that the volume of regulations poses the largest problem for 55 percent of small employers, as compared to 37 percent who are most troubled by a few specific regulations.⁶

Both the *Corporate Transparency Act of 2019* and the *ILLICIT CASH Act* would impose mandatory reporting requirements on those least equipped to handle them – America’s small business owners. First, both bills would impose a new paperwork requirement on small business owners by mandating every corporation or LLC with 20 or fewer employees and less than \$5 million in gross receipts or sales file beneficial ownership information with FinCEN upon incorporation. Updates would be required annually, under the *Corporate Transparency Act of 2019*, and within 90 days of the business making any ownership changes under the *ILLICIT CASH Act*. Either the small business owner, herself, or the accountant or attorney she pays, will have to ensure these documents are filed. One new paperwork requirement may not sound that burdensome to someone who does not run a small business, but it is quite a different story for the individual just starting a business or the small business owner who is adding this new form to the stack of forms he must already fill out and file.

¹ Holly Wade, *Small Business Problems and Priorities*, NFIB Research Foundation, 17, (August, 2016), available online at <https://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf>

² Holly Wade, *Regulations*, Vol. 13, Issue 3, 2017, 6, available online at <http://411sbfacts.com/files/Regulations%202017.pdf> (last visited May 16, 2018).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 10.

⁶ *Id.* at 9.

Importantly, it is unclear how small business owners will even find out about these requirements. For many, who have no idea who FinCEN is, there is a strong likelihood they will just ignore the request. And, regardless of their familiarity with FinCEN, many small business owners will view this data collection request with great skepticism. For example, every single year NFIB receives countless calls asking about the Census Bureau's Annual Business Survey form and whether the small business owner really needs to take the time to fill out and divulge the information required. It is unrealistic to assume that small business owners will simply fill out this new form and submit personal information, including a passport number/driver's license and date of birth, to a government agency many have not heard of before with no questions asked. A well-meaning small business owner who fails to file because she (1) never finds out about this new reporting requirement or (2) is skeptical about the legitimacy and appropriateness of this new form would be exposed to civil penalties of up to \$10,000 and criminal penalties of up to three years in prison.

In addition to finding out about this new reporting requirement and accepting it as a legitimate information request, small business owners would then be tasked with determining what information to provide. Determining who is and is not a "beneficial owner" to be reported will not be a quick and easy task for the average small business owner. Although the calculation of anyone who owns 25 percent or more of the corporation or LLC should be straightforward, determining who "exercises substantial control" of, or "receives substantial economic benefit" from the corporation or LLC many times will not be. Imagine the small, family-run restaurant employing 10-15 persons. After fifteen years of operation, the manager of the restaurant is the same person who helped open it. The financial owners of the restaurant trust her one hundred percent in all operations of the business. The financial owners are recent empty-nesters and like to travel. As a result, the manager has complete control over the restaurant's operations for several weeks each year. She also receives an annual bonus based on the gross receipts of the business. Does she "exercise substantial control" under either or both bills thereby making her personal information, including driver's license/passport number, reportable? How is an average small business owner to determine the answer to that question on his own? And, is that even a question his outside, paid lawyer would be able to answer with the kind of certainty needed to comply with a law imposing civil and criminal penalties for the wrong answer?

Most important, when NFIB surveyed its membership on this specific type of legislation in August of 2018, the opposition was overwhelming. Specifically, 80 percent of respondents opposed Congress requiring small business owners to file paperwork with the Treasury Department reporting on beneficial ownership.⁷

Unprecedented Privacy Concerns

These legislative proposals also raise serious privacy concerns for small business owners. Both bills require the Treasury Department to keep the beneficial ownership information for the life of the business plus five years and grant broad access to the information to federal, state, local, or tribal government agencies⁸ through a simple request.⁹

Under the CDD Rule, law enforcement is required to acquire a subpoena in order to obtain a company's beneficial ownership information from a financial institution unless that information is submitted to FinCEN with a suspicious activity report. The *Corporate Transparency Act* would allow any law enforcement agent access to this information without a subpoena or warrant. The *ILLICIT CASH Act* would allow "any government agency" access to this information without a warrant or a subpoena.

These bills are antithetical to current statutes on the books, which – even for sensitive kinds of national security activities, such as protection against international terrorism or clandestine intelligence activities – require the federal government to focus its investigative interest on someone in particular, some business in particular, or some account in particular before compelling a bank or other business to produce relevant information.¹⁰

Questionable Value to Law Enforcement

Finally, NFIB questions whether imposing significant and costly beneficial ownership reporting requirements on America's small businesses – from mom and pop groceries to local plumbers -- will stop or deter money laundering or other illicit activities. At a hearing before this committee on this same topic on May 21, 2019,

⁷ When asked, "Should Congress require small business owners to file paperwork with the Financial Crimes Enforcement Network each time they form or change ownership of a business?" a mere 11% said "yes" and a resounding 80% said "no," with 9% undecided. (NFIB survey, August 2018).

⁸ *The Corporate Transparency Act of 2019* would allow federal, state, and local law enforcement agencies to access information.

⁹ See proposed 31 U.S.C. 5333(a)(4)(A) (retention for five years after entity termination) and (B) (disclosure upon request from federal, state, local or tribal agency). Indeed, the legislation raises (H.R. 2513) the specter of having the U.S. Government spy on Americans for foreign governments, as it requires disclosure of the beneficial ownership information in certain circumstances to assist foreign agency investigations and foreign tribunals. See proposed 31 U.S.C. 5333(a)(4)(B)(ii).

¹⁰ See, for example, Stored Communications Act, 18 U.S.C. 2709; Fair Credit Reporting Act, 15 U.S.C. 1681u and 1681v; Right to Financial Privacy Act, 12 U.S.C. 3414; and National Security Act, 50 U.S.C. 3162.

Mr. Kenneth A. Blanco, the Director of FinCEN, said the following in response to questioning from Senator Warner regarding verification of information, "Senator, that gets a little bit more complicated. If what you're asking us to do is verify the information, I'll just be candid with you. That would be a big mistake. There would be no way that FinCEN could be able to verify that information." Without verifying the accuracy of millions of data points being entered into a new FinCEN database, law enforcement could not trust the accuracy of the information collected until they investigate a suspected criminal shell company. Both the *Corporate Transparency Act* and the draft *ILLICIT CASH Act* carve out millions of businesses from reporting requirements, including sole-proprietors, partnerships, and business trusts. If a criminal money launderer has any level of sophistication, they will simply set up their new shell company as a partnership or trust and evade law-enforcement detection.

Proponents of these legislative vehicles often cite a Financial Action Task Force (FATF) report from 2016 that identified the "lack of timely access to adequate, accurate and current beneficial ownership information" as a fundamental gap in United States efforts to combat money laundering and terrorist finance.¹¹ What proponents fail to mention is that this report was published well before the CDD Rule took effect, and beneficial ownership information started to be collected. Law enforcement now has access to this beneficial ownership information through a subpoena. The report also has very flattering words for the current U.S. anti-money-laundering system, including, "The AML/CFT framework in the U.S. is well developed and robust. Domestic coordination and cooperation on AML/CFT issues is sophisticated and has matured since the previous evaluation in 2006."

Proponents continue to fail to comprehend that FinCEN has no way of verifying the accuracy of beneficial ownership information today and has no plan to verify the accuracy in the future. A key component of FATF's recommendations is the verifiable accuracy of beneficial ownership information. This legislation would not solve that problem. As Director Blanco has admitted, FinCEN has no way of verifying beneficial ownership information.

NFIB opposes both the *Corporate Transparency Act* and the draft *ILLICIT CASH Act* because both bills would impose even more regulatory burdens on America's small businesses and establish an unprecedented intrusion into the privacy and civil liberties of millions of small business owners.

¹¹ The Financial Action Task Force and The Asia-Pacific Group on Money Laundering, *Anti-money laundering and counter-terrorist financing measures United States*, December 2016.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.